Case Numbers: 3200168/2020
3200172/2020

EMPLOYMENT TRIBUNALS

Claimants: **(1) Miss D Gray**
(2) Mrs K Smith

Respondent: **Rise Park Academy Trust**

Heard at: **East London Hearing Centre**

On: **9, 10, 11, 24 and 26 March 2021**
and in Chambers on 29 March 2021

Before: **Employment Judge Lewis**
Members: **Mrs W Blake-Ranken**
Dr L Rylah

Representation
Claimants: **Both in person**
Respondent: **Mr G Vials - Solicitor**

JUDGMENT

1. **The Claimants' claims for unfair dismissal fail and are dismissed.**

2. **The Claimants' claims for less favourable treatment because of part-time worker status fails and are dismissed.**

REASONS

The issues

1. The issues between the parties which fall to be determined by the Tribunal are as follows:

Unfair dismissal

1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was redundancy.

2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'? This will include consideration of the fairness of the selection, consultation and suitable alternative employment.

Less favourable treatment because of part time worker status

3. Is there a full-time comparator within regulation 2 of the Part Time Worker Regulations?

4. Were the Claimants treated less favourably than such a full-time comparator?

5. If so, was it because of their status as part time workers?

6. Was the treatment justified on objective grounds?

The law - Unfair dismissal – redundancy

7 Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).

8 Section 139(1)(b)(i) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

9 In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

10 It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation. See McCrea v Cullen and Davison Ltd [1988] IRLR 30. Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

11 There is no requirement for an employer to show an economic justification for the decision to make redundancies; see Polyflor Ltd v Old EAT 0482/02.

12 Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with equity and the substantial merits of the case.

13 In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:

13.1 Whether the selection criteria were objectively chosen and fairly applied;

13.2 Whether the employees were given as much warning as possible and consulted about the redundancy;

13.3 Whether, if there was a union, the union's view was sought;

13.4 Whether any alternative work was available.

14 However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams v Compair Maxam will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

15 Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 it was held that Employers need only show that they have applied their minds to the problem and acted from genuine motives. As was said in Capita Hartshead Ltd v Byard [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

16 In R v British Coal Corporation [1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in Gwent County Council ex parte Bryant [1988] Crown Office Digest 19 HC, namely that fair consultation means (a) consultation when the proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond (d) conscientious consideration by an authority of the response to consultation. Also see Rowell v Hubbard Group Services Ltd [1995] IRLR 195; and King v Eaton Ltd [1996] IRLR 199.

17 The Tribunal must judge the question of redundancy selection objectively by asking whether the system and its application fell within the range of fairness and reason (regardless of the whether the Tribunal would have chosen such a system or apply it in that way themselves; see British Aerospace v Green [1995] IRLR 433. The Tribunal should only investigate marks in a selection exercise in exceptional circumstances such as bias or

obvious mistake; see Dabson v David Cover & Sons Ltd UKEAT/0374/10; and Nicholls v Rockwell Automation Ltd UKEAT/0540/11.

18 If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM

19 The procedures to be applied and the criteria to be applied when selecting an employee for redundancy cannot be transposed to the process for deciding whether a redundant employee should be offered an alternative position. The principal test when examining the fairness of the process of selection for a new role is that set out in section 98(4) of the Employment Rights Act 1996. The criteria set out in Williams v Compair Maxam do not apply. See Morgan v Welsh Rugby Union [2011] IRLR 376.

20 The Polkey principle established in the House of Lords is that if a dismissal is found to have been unfair by reason of procedural defects then the fact that the employer might or would have dismissed the employee in any event had a fair procedure been followed goes to the question of remedy and compensation reduced to reflect that fact.

Less favourable treatment as a part-time worker

21 The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide at Regulation 2(1) that a worker is a full-time worker for the purpose of the regulations if [s]he is paid wholly or in part by reference to the time [s]he works, and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

22 The claimant's identified Julia Braybrook and Nicola Haley as their comparators. Mrs Smith was contracted to work 45.7 weeks a year as a TA Grade 3, her hours were 9.75 per week; the number of weeks for which she was contracted each year reflected her length of service and her entitlement to additional paid holiday. Miss Gray was contracted to work 15.75 hours per week for 45 weeks of year. On the evidence before us [page 810] Miss Haley who was also a TA Grade 3, was contracted to work 35 hours per week for 44.3 weeks per year, she was paid on a fractional basis of the full-time equivalent salary. Ms Braybrook was also a TA Grade 3 and was contracted to work 35 hours a week for 44.3 weeks per year; she was also paid on a fractional basis of the full-time equivalent salary. The full-time equivalent salary was based on 52 weeks per year. Both Claimants and their comparators were expected to attend work during the school term time and take their holidays during the school holidays. For staff in the nursery full-time hours were 36 hours per week.

Findings of facts

23 On the evidence before us we are satisfied that both comparators Ms Haley and Miss Braybrook were not comparable full-time workers for the purposes of the Regulations. We are satisfied that having regard to the practice of the employer they were considered to be part-time workers and were paid accordingly, the full time equivalent salary was calculated by reference to 52 weeks per year and the part-time salary reflected that they worked fewer than 52 weeks. We find that the hours were different in the nursery to the main school.

24 In terms of any confusion by the Appeal Manager in respect of full-time or part-time we are satisfied that Mr Johns did not have the benefit of the information that we have in respect of who was full-time or part-time, including Mrs Fox's evidence. We find that when he used the term he was relying on the Claimants' Trade Union Rep's submissions as to whether the positions were part-time. We have found that all the candidates in the pool were considered to be part-time according to the custom and practice of this employer.

25 The core of the claimant's complaints in respect of full-time and part-time work was in relation to the school. It was their case that in the redundancy exercise the school was looking for staff who could work five days per week mornings and afternoons and that they were disadvantaged by this requirement: to establish their claim they chose comparators who worked in the nursery. The Claimants also complained that one of their comparators was pulled out of the redundancy selection pool as a result of being assimilated into an interim management role.

26 We heard evidence in relation to that assimilation process and the completed application and the assimilation policy were in the bundle. We find that Miss Haley's application was properly considered by the Respondent in accordance with the contractual process. That the application for assimilation was granted had nothing to do with whether the comparator was either a full or part-time worker.

27 The Claimants' claims for less favourable treatment contrary to the Part-Time Workers Regulations fail and are dismissed.

Unfair dismissal

28 The Respondent relies on redundancy as the reason for dismissal. We accept the evidence from the Respondent that there was a need to make financial savings. Under the terms of the Academy's agreement with the Department of Education it was not allowed to go into deficit. The Directors reached the decision that in order to avoid going into deficit substantial savings were required. We accept that the minutes of the Directors' discussions from November 2018 [page 151; page 182 -191] accurately reflect the discussions and decisions by the Directors: that they identified a need to make savings to avoid going into deficit; they had already used other methods to reduce costs; that they agreed the proposal to reduce the number of support staff in order to make the financial savings identified; that they decided that where a named pupil had a requirement for support staff then this legally had to be kept in place and that role would not be part of the restructure; that the majority of the staff affected would be teaching assistants [page 159].

29 We accept Mr Adams' evidence which is consistent with the documents before us, with the official minutes of the Board meetings and the documents prepared in support of the proposed reorganisation and restructure.

30 At a meeting of the Respondent's Resources Sub-committee on 4 February 2019 (page 182), the proposed organisational change was one of the items for discussion and the proposals were discussed in detail. [See page 191 onwards in the minutes of that meeting].The pool of staff provisionally identified at risk was set out, the different staff to pupil ratios depending on the age of the pupils was explained and it was acknowledged that the proposed restructure would mainly impact Key Stage 1 and Key Stage 2. The Board of Directors agreed with the proposal and were satisfied that the cost savings should be made from reducing the number of support staff at Key Stage 1 and Key Stage 2. Possible

alternatives to redundancy, including other cost savings and income generating proposals were considered; this included a discussion of the new nursery which had received start-up funding from the Academy's reserves, it was recorded that the Nursery was intended to generate income in the future, rather than be a source of further cost.

31 The proposal was to reduce the total number of Teaching Assistants by 6, based on a reduction from three to two Teaching Assistants per year group within the infant and junior school, i.e. Key Stage 1 and Key Stage 2. The Reception year was not affected by the proposal due to the mandatory statutory pupil to staffing ratio. The proposal was that the Teaching Assistants' roles should be restructured so that staff would be able to be employed as Learning Support Assistants across both infant and junior school as appropriate and as needed.

32 Mr Adams worked with Caroline Fox, the Head Teacher to provide the financial input towards the draft support staff consultation paper which can be seen at page 168. On 15 February 2019 Mr Adams informed the Directors of the potential range of redundancy costs as a result of the proposal. The savings identified as a result of the proposed restructure were between £69,157 and £87,313 per year (see page 176). The Directors agreed it was necessary to make these savings in order to achieve a balanced budget.

33 In line with the Trust's Management of Organisational Change Policy, [page 146] the Board agreed that redundancies should be avoided as far as possible. The proposal was that 6 Teaching Assistants were potentially at risk. However, at the end of the process only 5 Teaching Assistants were made redundant.

34 On 6 March 2019 an informal staff meeting was held where the staff were informed about the proposed restructure and were told that there would be a formal meeting on 12 March where the Management of Organisational Change of Policy and the draft consultation document would be shared. That meeting on 12 March 2019 was attended by representatives of the recognised Trade Unions, an HR Adviser from the local authority as well as Directors of the Trust. The draft consultation document was shared with the recognised Trade Unions before the staff were informed of its contents. The GMB Union provided comments on it on 11 March 2019 [page 200], in advance of the meeting with the staff on 12 March and the comments were addressed at that meeting. The draft consultation document was circulated to staff on 13 March 2019. We were told by Mrs Fox and Mr Adams that the Trade Union Representatives were consulted throughout the redundancy process and they agreed to the proposal and the approach including selection process. We were taken to evidence of the involvement of Trade Union in the process and there is no evidence of them having entered any objection to the proposals or to the process itself.

35 The proposed restructure affected 36 Teaching Assistants. The Respondent considered all of the affected staff to be part-time. We were taken to a table setting out each staff member's salary and holiday entitlement, showing the salary calculated as a proportion of the full time equivalent, based on 52 weeks per year. None of the affected staff were employed at 100%, i.e as full-time staff. We accept that evidence.

36 A formal meeting was held with the Teaching Assistants/ Support Staff on 12 March 2019 attended by Mr Adams, Mrs Fox and both Claimants [201]. During the meeting the Respondent set out the proposal and answered a number of questions raised by members of staff. Staff were made aware of the restructure proposal and told they could raise further concerns with either the Trust or their Trade Union Representatives, or both. The financial

cuts which had already been made across other areas of the Trust including office, other staff and cleaners were discussed and the staff were assured that alternatives to redundancy had been explored and the proposed restructure was considered necessary.

37 At this meeting that Miss Gray asked why Mr Adams' role was necessary and why it could not be incorporated into two other staff members' functions. Miss Fox considered this to be an inappropriate question given the whole staff group were present, including Mr Adams. Mrs Fox thought the question was personal and should not have been raised in such a public forum and she asked Miss Gray to speak to her in her office as a result. Miss Gray alleges that this comment had an influence on the outcome of the redundancy process. However, Miss Gray had apologised to Mr Adams after the meeting and Mrs Fox took that into account: given Miss Gray's apology Mrs Fox thought there was no need to take any further action [page 384]. Mrs Fox denied that Miss Gray's comment had any bearing on the redundancy selection and maintained that the decisions were based on the scores in the selection exercises and the selection matrix and that the comment was not considered. We accept her evidence on this point: for the reasons set out below we have found that Miss Gray's scores were not manipulated in any way.

38 The minutes of the 12 March meeting were sent to the staff together with a set of FAQs (pages 201 and 205) on 19 March 2019. At the meeting that they would be selected based on the outcome of a combination of a skills assessment test, an interview and existing performance appraisals. The staff were all offered and encouraged to take up interview training in advance of their interview dates. They were told that the interviews would be competency based in order to give them more confidence in the process, together with advice on how to prepare for the interview.

39 On 26 March 2019 it was agreed by the Board of Directors that the tests would be pitched at year 2/3 level so as they would be accessible to both infant years 1 – 2 and junior school years 3 – 6 TA Support Staff. It was decided that the test should be set towards the middle of the year groups to give the support staff who normally worked at the lower end of the school a better chance. Mrs Fox told us, and we have no reason to doubt her evidence on this, that at many other schools this test was set at year 6 level. The Respondent considered it was fairer to assess the TA's at year 2/3. We are satisfied that the Respondent's view was that this was a fairer way of allowing Teaching Assistants from Key Stage 1 or 2 to have a fair chance of completing the tests and to allow appropriate comparisons to be made and that also to ensure that the successful candidates would be able to carry out the role of learning support assistant across all year groups in a primary stage from years 4 – 11.

40 The Claimants alleged that the test was set at this level to advantage the junior school teaching assistants – we have rejected that suggestion. We are satisfied that this was a reasonable approach for the Respondent to take. The staff were informed that the test should take approximately 20 minutes to complete; however, they were not timed, and they were allowed to take longer than 20 minutes if necessary. We are also satisfied that if the Trade Union or indeed the Claimants themselves considered it to be unfair to set the skills tests at year 2/3 they had every opportunity to say so. We accept that the level was agreed by the Board and that their reasons for doing so were within the range of reasonable responses open to them.

41 During the consultation period the affected Teaching Assistants were given the opportunity to book individual meetings to discuss their personal circumstances. Mrs Fox

told us that only two members of staff opted to book meetings with herself together with their Union Reps. One of these was Mrs Smith.

42 Mrs Fox met with Mrs Smith on 11 April along with Kelly Scott from HR and Wendy Whittington, the Claimant's Union Representative. Mrs Smith asked that her 9 hour per week contract would be maintained under the new structure and that her working days remain the same. This was also set out in Mrs Smith's restructure questionnaire [page 244]. This working pattern had been agreed in 2014 following Mrs Smith's return to school after a period of leave due to serious illness (cancer). Mrs Fox explained to Mrs Smith that all the posts were being remodelled under the new structure and she was not able at that point to guarantee working hours. Her preference would be taken into consideration once the selection process had been completed.

43 Mrs Smith alleges that she was selected for redundancy in part, or mainly because she had asked to work 9 hours and retain the days that she previously worked; she says that her request did not fit in with what the school wanted from TA's going forward. We accept Mrs Fox's evidence that the information on the questionnaire was considered as a preference and was not used in order to determine who should be selected for redundancy. We find that the selection for redundancy was based on the scoring matrix after the different elements of the selection process had been taken into account.

44 On 1 May 2019, Mrs Fox reminded the Trade Unions and leadership staff that there would be a further formal consultation meeting on 2 May 2019 (page 271) about the restructure. At the meeting on 2 May the Respondent shared the final confirmed consultation document which had by then been agreed by the recognised Trade Unions.

45 The interviews were split between two panels, each containing a member of the senior leadership team and somebody from the infant school senior leadership and the junior school leadership team to ensure consistency and fairness in scores. Before the interviews both Mrs Smith and Miss Gray attended the training session provided in respect of competency-based selection interviews.

46 Two separate skills assessments with the same level of difficulty were prepared in English and Maths so that staff would not be tempted to share the contents of the assessments with other staff who are yet to take them.

47 Rachel Robinson who was then head of the Infant School and Cheryl Street, Head of Junior School carried out the initial marking of the assessment papers on behalf of each selection panel. The scores awarded in each test were then second checked by Steve Adams, the School Business Manager. He noticed an error in the marking of the English papers which affected a number of the candidates' papers, including Miss Gray's: as a result the papers were remarked and further marks were awarded to a number of members of staff, including Miss Gray whose score was increased from 30 to 33 (page 284 – 286c). We find that due to the fact that several members of staff had their papers marked incorrectly, several other staff members also had their scores increased following the remarking and the increase in score did not affect the overall outcome for Miss Gray.

48 We find that Mr Adams' involvement was limited to moderating the test papers, that is checking for errors in the marking, and he was not involved in any other aspect of the selection process. We have accepted Mrs Fox's evidence that although Mr Adams' partner was part in the pool, her scores were such that she was not anywhere close to the threshold.

We find there was no unfairness or any benefit to her as a result of his role in the quality checking process. We are satisfied given the size of the leadership team that it was appropriate and reasonable to have Mr Adams carry out this role.

49 Mrs Smith complained that the information about the selection process was drip fed deliberately to the affected staff. There is no suggestion that some staff were given more information than others and she does not suggest there was any bearing on the outcome. We find that following the informal meeting on 6 March, all staff were aware that the formal consultation document would be shared with them on 12 March. There was no ongoing drip feeding of the process: from 12 March 2019 it was clear what the process would be. Any complaint is limited to the period of 6 days between the informal meeting and 12 March when the proposals were set out.

50 The Claimants also complained about the timetable for interviews and allege that it was unfair that Mrs Smith was taken out of order. The timetable for interviews was drawn up in alphabetical order but adjustments were made to reflect the candidates availability, where they did not work on the day of their allotted interview. The Claimants did not spell out how this would make the process unfair.

51 Mrs Michelle Williams gave evidence in respect of the arrangements for the interview panels. She explained that the candidates were split into two groups, the first and last part of the alphabet, and the teams interviewed those in their own groups subject to people not working on a particular day in which case they were interviewed on a day in which they were due to work. Once the interview questions had been decided by the leadership team, Miss Street sent out some model answers which were discussed, tweaked and agreed on. These were added to the interview question grid. During the interviews it was explained to all the staff that the interviewers would be writing down the answers in a separate box. Both members of the team scribed the answers and highlighted them a model template. After the interviews they reviewed at the answers and how much of the model template had been answered and gave each member of staff a score based on the answers they had given. There was then a review, or check back, over previous candidates to check that their scoring was consistent and the scorer amended the scoring if it was considered too harsh or too generous. The scores were finalised in each group then the two teams met to go through the answers to check that there had been consistency across both teams. Once the panel was happy that the process was fair and consistent, they added all the scores to a final sheet. We accept her evidence as to what was done and accept that the purpose behind this method was to ensure fairness as far as reasonably possible to all candidates.

52 Miss Gray and Mrs Smith were interviewed by Rachel Robinson and Rebecca MacLean. Mrs Williams was aware that Mrs Smith believed she had performed very poorly in the interview, as she told her as much on the day that she was told the results. Mrs Smith said to Mrs Williams words to the effect that she felt she would be in the bottom group as she had struggled on both interview and tests.

53 Rachel Robinson told the Tribunal that at the relevant time, she was a Deputy Head and Head of the Infant School. She was responsible for conducting annual performance reviews with both Claimants, she never had any disciplinary issues with either Miss Gray or Mrs Smith. They both worked 3 mornings per week. She had never had any issues with these hours and in her experience the school was very supportive of flexible working requests. Mrs Robinson sat on the Board of Directors and was aware of the proposal for

the restructure and the reasons behind the restructure. Mrs Robinson confirmed that all 36 Teaching Assistants employed by the Academy in the Infant and Junior school were affected, they all worked on a part-time basis, being term-time only, on reduced working hours per day; the normal working hours for a teacher in the school was 37 hours per week. The only Teaching Assistants who are not affected by the restructure were the staff who worked on a one to one care and support basis with an individual child who might have an Education and Health Care plan or may be disabled under the Equality Act, and also the staff who worked in the Nursery and Reception within the Early Years Foundation stage where the work and the qualification was different and there are mandatory staffing ratios.

54 Mrs Robinson told us that the assessment questions for the Maths and English tests were taken from assessments which would be given to pupils in year 2 or 3; a selection of questions were chosen to try and ensure each candidate had a fair chance. Mrs Robinson carried out the first marking of the Maths paper and told us that she marked all the papers consistently using the same marking criteria.

55 Mrs Robinson was on the interview panel for Miss Gray on 8 May 2019. The questions were marked with a score between 1 – 5, 1 being a low score demonstrating no understanding of the question and 5 being an excellent response. She told us that Miss Gray mainly provided below average responses to the questions asked and scored a total of 25.5(see page 274). When asked in her interview to give examples to back up the responses to the questions, Miss Gray's responses were very general and she struggled to provide specific examples. Mrs Robinson recalled that she and Rebecca MacLean had to prompt Miss Gray to get additional information from her but without these prompts she had struggled to provide answers to the questions and would have received a lower score. In response to one question Mrs Robinson recalled Miss Gray's answer was "Well you just do, don't you" with a shrug of her shoulders; she thought Miss Gray appeared to have a casual approach rather than conveying a professional manner in the interview. Miss Gray complained that nothing was written down during her interview, we do not find this to be a fair or accurate criticism, notes were evidently taken. We accept Mrs Robinson's evidence that the answers given were lacking in substance and there was therefore not as much to write down as there had been with other candidates [for example, page 297].

56 Mrs Robinson and Rebecca Maclean interviewed Mrs Smith on 15 May 2019. Mrs Smith received a total score of 30 for her interview performance (page 297). Mrs Robinson acknowledged that Mrs Smith demonstrated skills relevant to the post but told us that she struggled to demonstrate how she would be able to support children who had additional needs or needed support in relation to certain aspects of learning. Mrs Smith was able to give some basic examples of how she supported children and how she had been successful in implementing practices to support learning. However, she did not demonstrate a high level of understanding as to why the practices had been successful. Mrs Smith scored low marks of 2 and 2 respectively in the questions relating to pupils with SEN and disruptive behavior. We are satisfied those marks reflect the answers written down and that those answers do not suggest that she was best suited for the vacancy for a one to one support for a SEN pupil. There was nothing before us to suggest that either Claimant were deliberately marked down by Mrs Robinson or Miss MacLean.

57 Mrs Robinson and Rebecca MacLean made some notes during each interview and awarded separate scores based on their view of the responses. After the interview they compared notes and scores. Their notes were compared and discussed and moderated at the end of each interview. They then moderated the scores by checking the answer

structures and looking back at other candidates to ensure the marking was fair and consistent. The scores were then moderated against the scores given to candidates by the other interview panel. We were taken to the notes of the interviews which we find to be consistent with the evidence given. We are satisfied that both Claimants had been offered individual training and guidance on competency based interviews. The guidance document [page 273 N - P and at 273 N] specifically set out that candidates could take their examples with them to the interview.

58 The appraisal/performance scores formed a separate part of the process. Mrs Williams and Mrs Robinson both told the Tribunal that no notes or minutes were taken of how the performance score was reached but both maintained that the scores were fair and reasonable. They were each able to provide evidence to the Tribunal to explain why each of the Claimants received the particular score that they were given. Mrs Robinson told us that Miss Gray scored a 7 for performance because, although a good worker, she was not prepared to do any additional tasks unlike many other members of staff; Mrs Smith scored 8 as one of the factors was a slightly more willing attitude. In reaching this decision the panel took into account the candidates appraisals over the last two years [pages 120 – 124 and pages 127 – 134] together with their own knowledge of the candidates' skills, experience and personal attributes such as their commitment to the role, punctuality, attendance (excluding any authorised sickness absences) which allowed them to undertake what they called a 360 degree assessment of the staff. These criteria were matched against the existing performance criteria grid (see page 181) and then moderated between the two selected panel members. The results from the interviews and performance appraisals were then moderated between the two groups to ensure there was consistency across the groups. We found this evidence to be consistent with the evidence given by Mrs Williams. We note from the matrix that at page 303 that the scores ranged from 5 to 10. There is one 5, a cluster of 8s and a number of 10s. There was nothing to suggest a deliberate effort to mark down either Miss Gray or Mrs Smith and we accept the evidence from Mrs Williams and Mrs Robinson that the scores for performance were reached following a discussion in which the participants attempted to be as fair as possible to each of the candidates using their professional skill and knowledge to determine the appropriate score and to check that against each other's assessment wherever appropriate.

59 At the end of this process, all of the scores were added up and the applicants in the lowest ranking on the scores of matrix was elected for redundancy. The matrix is at page 303. Miss Gray and Mrs Smith were both in the lowest 6 scoring candidates and were selected for redundancy.

60 Feedback sessions were arranged with each of the staff and an opportunity provided to discuss the scores they had received in the selection process and any concerns or queries they may have before any letters to confirm the redundancy was sent. The feedback schedule for Thursday 23 May shows 17 of the 36 affected staff had feedback provided by Michelle Williams and Cheryl and the remaining 19 employees were provided with feedback by Miss Robinson and Miss Maclean [page 304]. Mrs Robinson informed Miss Gray and Mrs Smith verbally that they had been unsuccessful in one of these feedback sessions and also informed them that the HR representative was on site and able to provide support. The letters confirming their redundancy was sent out on 24 May 2019 [page 305 and 307]. The letters set out the right of appeal was to be exercised by 14 June 2019.

61 On being informed they had been unsuccessful, both Claimants immediately went on sick leave and did not return to the school before 31 August 2019, the date their notice expired.

62 Of the 6 individuals identified for redundancy, one was not made redundant as a flexible working request had been received by a successful candidate which resulted in there being a job-sharing opportunity which meant that only five individuals were made redundant.

63 The Claimants complained that the weighting of 4 given to performance / appraisal part of the assessment and that this weighting was in itself unfair as they had not been told about it. We find that this had been agreed by the Board and the Trade Unions had been consulted in respect of the weighting to be given to the respective elements. Based on the evidence that we have seen we find that even if this part of the exercise had not been weighted each Claimant would still have been in the bottom 5.

Scores, Marks and Weighting

64 The Claimants both criticised the marking of the tests. We heard considerable evidence in respect of criticisms of the tests and their marking. We do not accept that the criticisms made by the Claimants are well founded for the reasons set out below.

65 The English test: Mrs Smith was critical of the marking of a question where candidates were asked to use one preposition to complete two sentences Question 6 (see page 286B), Mrs Smith used the same preposition i.e. one preposition, in both sentences as did a number of other candidates. However, a large number of candidates used one preposition in each sentence, that is, a different preposition in sentence A to that used in sentence B. Due to the fact that a number of candidates made the same mistake it was felt that the question was ambiguous and everyone who gave a different preposition in each sentence would still get a point. The Claimants also found an error at page 1043 where one candidate failed to identify the unnecessary apostrophe in the word 'boots' and was not marked down. In respect of pre-order and whether it needs a hyphen or not Miss Gray makes the point that Mrs B did not put in a hyphen in her response. We find that she was ninth in the ranking below both Claimants and that this did not affect the result.

66 We are satisfied that it is for the Respondent to adjudicate on what is the correct or incorrect answer and it is reasonable for it to rely on the official Cambridge English Dictionary rather than online dictionaries or websites. This was addressed in the Claimants' appeal/grievance (see pages 633, 640 and 642).

67 The Claimants disputed maths question 10 was marked correctly. Miss Smith used each number once in the equation whereas one other candidate Ms P only used two of the numbers. We are satisfied it is for the Respondent to adjudicate on the correct answer as long as they do so in good faith and fairly. We are satisfied that the question did not state that each of the numbers in the sequence must be used, that was Mrs Smith's interpretation, we do not find the Respondent's interpretation of the correctness of the answer was such as to take it outside the range of reasonable options available to it. Again, we are satisfied on the evidence that this difference would not have affected Mrs Smith's ranking in terms of the overall result.

68 Miss Gray complains that Mr Adams lacked objectivity after she had made the comment about his role. We are satisfied that Mr Adam's remarking was responsible for Miss Gray being awarded three additional marks. Miss Gray also questioned whether her paper had been photocopied and marks altered. We are satisfied that the marks were increased as a result of Mr Adams' review from 30 to 33 and that the mark of 33 was used in the final matrix and fed into the Claimant's ranking. [See page 662 and page 303]. We also note that Miss Gray would have needed another 7 points in order to be safe.

69 We heard from Mr Adams that the Respondent was aware that mistakes can be made in marking any exercise as a result of human error taking into account that the marking was being done by individual people and not by machines, and this was the reason for having Mr Adams carry out a second check, to try to pick up any mistakes. In his role as quality assurance or second marker he identified an error rate of 0.03%, which we accept is extremely low. We do not find that there is any apparent or actual unfairness in his undertaking that role. We find that the errors we were taken to fall within what was considered to be the acceptable error rate identified by the Respondent. We are satisfied over all that the Claimants did not demonstrate that they would have generated sufficient extra marks to save them from being in the bottom 5 candidates and therefore selected for redundancy.

Suitable alternative employment

70 The Claimants complain that Nicola Haley was assimilated into a different role in the Nursery. It was not disputed that Miss Haley was already employed in the nursery setting, the Claimants disputed that she had acted as a deputy manager however her experience in this role was set out in her successful application for assimilation (page 861). We find that there is no reduction in the number of nursery staff, for the reasons already given. Miss Haley was not made redundant, she continued in her role as deputy manager following the assimilation and that was in accordance with the Respondent's assimilation policy, we find it was reasonable for the Respondent to follow its own policy.

71 The Claimants pointed to a role as pupil support LSA on a one to one basis for a child with ASD who was due to start at the school in the following school year. Their colleague Natasha Hunt was offered this position. We were told by Mrs Fox this was offered to Miss Hunt because of her recent experience working with a child with very similar needs. Mrs Fox explained that the school was looking for continuity across five days due to the particular needs of the child but that was not the principle reason for Miss Hunt being identified for that role: the main reason was her recent experience in dealing with a child with very similar SEN needs. In any event, the school was informed that the child would not be coming to the school the following year and Miss Hunt was made redundant at the end of the summer term, that is, at the same time as both Claimants.

Job share or part-time work

72 The Claimants alleged that they were not considered for a job share and that school was hostile to job sharing. We accept Mrs Williams' evidence that there was no hostility towards job sharing, we find this is consistent with the evidence that one of the 6 potential candidates for redundancy was offered a job share following the request for a job share by one of the successful candidates.

73 Miss Gray also alleged that she was selected for redundancy because she was considered to be a trouble maker. We found no evidence to support that allegation at all. We accept Mrs Fox's evidence that although she thought it appropriate to speak to Miss Gray about her comment at the first consultation meeting that had no bearing on Miss Gray's selection for redundancy. We are satisfied that Mrs Fox was not involved in the selection process at all. Nor is there any evidence to suggest Miss Gray was selected because of her comments about Mr Adam's son being appointed as the caretaker. We accept Mr Adams and Mrs Fox's evidence that by employing a caretaker the school made cost savings in respect of maintenance and cleaning costs.

Pupil Premium Post

74 Both Claimants went off sick on being told that they had been selected for redundancy and were not at school to see the advert for the pupil premium post which was placed in the school staff room. On being told about the role Miss Smith phoned the school office and was told by the Secretary that the advert would not be sent out to her. However, once Mrs Fox heard that Miss Smith had been told this she immediately corrected the position and ensured that the advert was sent out to both Claimants later that same day: this meant they still had three weeks which to apply for the role. Neither Claimant applied. The Claimants did not suggest that they should have been slotted into this role without having to respond to the advert. The Respondent had decided to require all candidates to be interviewed for roles given the number of people affected and the need to make sure they had the best candidate suitable for the role going forward. We find that this was a decision that was open to them in the circumstances, that is within the band of reasonable responses.

75 We find that the Respondent considered at an early stage, whether it should offer voluntary redundancies and rejected this on the basis that the cost would be unpredictable and although potentially the costs savings might be reached it would not have necessarily ensured the best candidates were retained going forward (as set out in the minutes of the Board meetings, referred to above). We do not find that the Claimants were entitled to be offered voluntary redundancy.

The Appeal

76 The Claimants did not in appeal within the specified time limit. They sought to lodge grievances about their selection for redundancy and were allowed to appeal out of time instead. They then made complaints about the time it took to resolve their appeal. Mr Johns, one of the Board Members involved in considering the appeal, gave evidence that he set out in his state about the history to the appeal; his evidence was uncontested. He told us that he took advice during the process from the Local Authority HR Department, but the decision was that of the Appeal Panel alone. The Claimants were given up to the end of term to confirm that they wished the grievance to be dealt with as an appeal and they confirmed this on the day before the end of term. Mr Johns told us, and we accept, that it was always difficult for schools to arrange meetings of any sort during August; the hearing was arranged on 30 September around the availability of the Claimants and their Trade Union Rep as well as the appeal panel. The panel looked into the Claimants' concerns and contacted Mr Adams and Mrs Fox in respect of specific complaints raised by the Claimants and asked for the scores to be checked. Part of the delay was the time involved in the panel members checking with Mr Adams and Mrs Fox and then there was also some delay in respect of one of the panel members confirming the contents of the minutes. The draft

outcome was prepared on 25 October and the final appeal outcome was sent on 12 November 2019.

77 We have not found the delays to be so unreasonable in the circumstances as to render the process unfair. We are satisfied from the evidence before us that there was a thorough consideration of the grounds of appeal and those are set out in the detailed outcome letter addressing the concerns raised by the Claimants.

Conclusions

78 The Claimants submitted that there ought not to have been redundancies at all. We are satisfied that there was a clear business case set out supporting the need to make substantial financial savings: the school was facing a deficit and we are satisfied that other savings had already been considered and made. It is not for us to substitute our view of how those savings ought to have been achieved for that of the Respondent, it is for the Respondent to decide how to make the savings required by its budget.

79 We are satisfied that the decision as to whether to invest money into the Nursery was also a business decision for the Respondent and not one with which we should or can interfere. We also note that the result of the investment of reserves into the nursery has been that the nursery is now a profit-making enterprise which is generating income for the school as a whole and also achieving its other purpose which was to attract pupils to the school and is considered by the Board to be success.

80 We do not find the criticism that there had been a failure to consult to be made out. We find that there was consultation between the Respondent and the Union Representatives. Miss Gray attended the consultation meetings in March and was informed of the opportunity to have individual meetings. Mrs Smith attended a further meeting with her Trade Union Representative on a one to one basis. We are satisfied that that opportunity was offered to each of the staff affected. We are also satisfied that the proposal and the proposed process was sent to the Trade Union at an early stage before the proposals were finalised and at which point, they had an opportunity to make representations and contribute to the proposals.

81 We are satisfied that it was open to the Respondent to require competitive interviews and doing so did not take the process outside the range of responses of a reasonable employer. We have found that the process was agreed at Board level. The weighting was agreed at the start of the process and was applied to everyone. The Claimants both had the opportunity to, and did, challenge their test scores in their appeal. Their marks were revisited. The fact that the Claimants were not given their individual scores at the time does not render the process unfair. Miss Gray was given her interview sheets when she raised a grievance/ appeal, she referred to them [page 448] and Miss Smith [415]. They had seen their interview notes as a detailed response to their criticisms in their appeal. Where selection is by a competitive interview it is not necessary for each candidate in the pool to see the everyone else's scores and be able to challenge them. (See Morgan and Welsh Rugby Union UKEAT/0314/10/LA). We are satisfied that the Claimants' criticisms of the individual scores and the fact they did not know what score they needed to be successful misunderstands the process: the candidates were ranked and it was only the bottom six who were to be selected for redundancy; adjusting the Claimants' marks upwards did not mean that they would avoid being selected if others were also having their marks adjusted.

82 It is not for the Tribunal to rescore the tests, interviews or the performance rankings. We are satisfied that the Respondent applied its process consistently and fairly, there was no evidence of bad faith or pre-determined outcome or of deliberate marking down the candidates because of the hours that they were working or any comments or remarks they had made about other staff, or because they had stated that they wanted to work part-time. We have found that the interviews were carried out in good faith and have accepted the Respondent's evidence that the scores were an accurate reflection of how each candidate performed.

83 The performance was weighted at 20% of the overall total, the interviews weighted at 40%, the tests at 20% each. These weightings were agreed by the Board and the Trade Union. We do not find this to be outside the range of reasonable responses open to this employer. We are satisfied that it is up to the Respondent to decide upon the weighting as long as it is within a range of reasonable responses: it is not in itself unfair to weight the interview more heavily than the other elements. We find that the Respondent's intention was to give the candidates the best opportunity to demonstrate the skills required for the role and their potential. We have already noted that each candidate was given the opportunity to have training in the competency based interview skills.

84 It is not for the Tribunal to substitute our own selection process or to say what we would have done in the Respondent's place. We are satisfied that it was open to a reasonable employer to use the process this employer decided upon. We do not find any evidence of bias, nor do we find that the scoring errors identified by the Respondent and corrected in the process were such that they took the process itself outside the range of reasonable responses. We are satisfied that the Respondent put in place a reasonable and fair system to try and eliminate mistakes as far as possible,

85 We find that there is no basis for the Claimants' accusations that the Respondent acted in bad faith or was being underhand, deceitful or manipulating. Many of the Claimants' comments seemed to the Tribunal to be based on a selective rather than a reasonable interpretation of the documents and in some instances an apparent misreading or wilful blindness to the actual content of the document.

86 We find that the Claimants were dismissed for redundancy and that the Respondent acted in all respects within the band of reasonable responses open to a reasonable employer. We find their dismissals for redundancy were fair. The Claimants' claims for unfair dismissal fail and are dismissed.

Employment Judge Lewis
Date: 30 July 2021